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<b>W.J., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0489</b>
	)	<b>Issued: December 21, 2020</b>
<b>U.S. POSTAL SERVICE, REVERE CARRIER</b>	)	
<b>ANNEX, Revere, MA, Employer</b>	)	
	)	

*John L. DeGeneres, Jr., Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

## DECISION AND ORDER

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

## JURISDICTION

On January 2, 2020 appellant, through counsel, filed a timely appeal from a November 6, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days has elapsed from OWCP's last merit decision, dated April 27, 2018, to the filing of

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). The Board, in exercising its discretion, denies the request for oral argument finding that the arguments on appeal could adequately be addressed based on the case record as the Board does not have jurisdiction over the merits of this case.

this appeal, pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

### **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

On February 24, 2017 appellant, then a 51-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral knee and hip osteoarthritis as a result of factors of his federal employment. He noted that he first became aware of his condition and realized its relationship to his federal employment on December 1, 2016.

In a November 8, 2016 statement, appellant provided a history of his work for the employing establishment commencing in 1993 and described his repetitive work duties. He indicated that he had never been absent from work for more than three days. Appellant also indicated that he had no periods of light duty, limited duty, or modified duty.

Appellant submitted medical evidence that predated his occupational disease claim and addressed his lumbar and bilateral hip conditions.

Appellant also submitted a December 1, 2016 letter by Dr. Byron V. Hartunian, an attending orthopedic surgeon specializing in sports medicine. Dr. Hartunian noted appellant's description of his letter carrier work duties and reviewed an official copy of the position description. He repeated appellant's history of lumbar and bilateral hip and knee symptoms and medical treatment. Dr. Hartunian discussed examination findings and reviewed diagnostic test results. He diagnosed right hip arthritis with a zero millimeter (mm) cartilage interval at the femoral-acetabular joint, primary right knee arthritis with a three mm cartilage interval at the medial femorotibial joint, left hip arthritis with a zero mm cartilage interval at the femoral-acetabular joint, and primary left knee arthritis with a three mm cartilage interval at the medial femorotibial joint. Dr. Hartunian opined that appellant suffered from degenerative osteoarthritis of both hips and knees that was likely aggravated by his work activities, which included repetitive lifting, walking, and climbing. He explained that this likely permanently aggravated his bilateral hip and knee osteoarthritis. Dr. Hartunian noted that the aggravation was permanent as appellant's loss of cartilage was irreversible. He advised that the work duties involved in his 20-year career hastened his osteoarthritis and without 20 years of letter carrying the disease would not have progressed as early and fast as it had. Dr. Hartunian concluded that there was no doubt that appellant's impact-loading activities contributed to the development and progression of his bilateral hip and knee osteoarthritis.

OWCP, in June 27, 2017 development letter, requested additional information from the employing establishment. In a June 28, 2017 development letter, it informed appellant of the deficiencies of his claim. OWCP advised him of the type of factual and medical evidence

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

necessary to establish his claim and provided a questionnaire for his completion. It afforded both parties 30 days to submit the necessary evidence.

On July 26, 2017 appellant, through counsel, responded to OWCP's development letter. He described his activities outside his federal employment. Counsel contended that Dr. Hartunian's December 1, 2016 report was sufficient to establish causal relationship between appellant's bilateral knee and hip condition and his repetitive work duties.

Appellant submitted additional medical evidence that predated his occupational disease claim and addressed, among other things, his lumbar and hip conditions.

Appellant also submitted a February 24, 2017 medical report by Dr. Michael B. Bader, a Board-certified internist. Dr. Bader diagnosed, among other things, unspecified osteoarthritis, unspecified site.

OWCP, by decision dated September 5, 2017, denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that his diagnosed bilateral hip and knee condition was causally related to the accepted factors of his federal employment. As such, it concluded that the requirements had not been met to establish an injury or medical condition as causally related to the accepted employment factors.

On September 19, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. On February 7, 2018 counsel instead requested a review of the written record.

OWCP continued to receive medical evidence that predated appellant's occupational disease claim and addressed his lumbar and bilateral hip conditions.

By decision dated April 27, 2018, an OWCP hearing representative affirmed the September 5, 2017 decision, finding that Dr. Hartunian's December 1, 2016 opinion was speculative and insufficient to establish causal relationship.

On September 13, 2019 appellant, through counsel, requested reconsideration. Counsel contended that an accompanying letter dated September 10, 2019 by Dr. Hartunian established a bilateral hip and knee condition causally related to the accepted factors of appellant's federal employment. In this letter, Dr. Hartunian reiterated his opinions that appellant's hip and knee arthritis was permanently aggravated by the work activities he performed during his 20-year career, which hastened his condition and that without these activities, the disease would not have progressed as early and fast as it did. He restated his opinion that there was no doubt that appellant's high-impact loading work activities contributed to the development and progression of his arthritis. Dr. Hartunian maintained that the duration and extent of these activities definitively established causal relationship.

By decision dated November 6, 2019, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>4</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>8</sup> OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>9</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to

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<sup>4</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>7</sup> *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>9</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also id.* at § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

<sup>10</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

the correctness of OWCP's decision. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>12</sup>

### **ANALYSIS**

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations<sup>13</sup> and procedures<sup>14</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>15</sup> The most recent merit decision was OWCP's April 27, 2018 decision which denied modification of its denial of appellant's occupational disease claim. As his request for reconsideration was not received by OWCP until September 13, 2019, more than one year after the April 27, 2018 decision, the Board finds that it was untimely filed. Because appellant's request was untimely filed, he must demonstrate clear evidence of error on the part of OWCP in having denied his occupational disease claim.

In support of his untimely request for reconsideration, appellant, through counsel, submitted Dr. Hartunian's September 10, 2019 correspondence and contended that it established a bilateral hip and knee condition causally related to the accepted factors of his federal employment. In his correspondence, Dr. Hartunian referenced his prior December 1, 2016 report and reiterated his causation opinion and rationale and explained that the accepted employment factors were sufficient to have resulted in appellant's current bilateral hip and knee osteoarthritis. While Dr. Hartunian provided rationale in support of his opinion that appellant sustained an employment-related injury, which may have required further development if submitted prior to OWCP's denial, it is not manifest on its face that OWCP committed an error in denying appellant's claim.

The Board has held that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence that on its face shows that OWCP made an error.<sup>16</sup> Even a detailed, well-rationalized medical report, which would have required further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.<sup>17</sup>

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<sup>12</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

<sup>13</sup> 20 C.F.R. § 10.607(a); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>14</sup> *Supra* note 6 at Chapter 2.1602.4 (February 2016); *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>15</sup> 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>16</sup> *G.B.*, Docket No. 19-1762 (issued March 10, 2020).

<sup>17</sup> *A.M.*, Docket No. 20-0143 (issued October 28, 2020); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *E.B.*, Docket No. 18-1091 (issued December 28, 2018); *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.<sup>18</sup> Dr. Hartunian's report therefore does not demonstrate clear evidence of error and would not require a merit review of the case.<sup>19</sup>

The Board thus finds that appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying his occupational disease claim. Appellant has therefore not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's April 27, 2018 decision.<sup>20</sup> Thus, the Board finds that his untimely request for reconsideration failed to demonstrate clear evidence of error.<sup>21</sup>

On appeal counsel contends that OWCP committed clear evidence of error as it did not find that Dr. Hartunian provided a definitive opinion on causal relationship based on objective evidence that raised an uncontroverted inference of causal relationship. As explained above, the Board finds that the evidence submitted with the untimely reconsideration request is insufficient to meet appellant's burden of proof.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>18</sup> *A.M., id.; T.C., id.; D.G., id.; E.B., id.; M.N.*, Docket No. 15-0758 (issued July 6, 2015).

<sup>19</sup> *Id.*

<sup>20</sup> *See J.V.*, Docket No. 18-0963 (issued February 13, 2020); *S.P.*, Docket No. 17-1708 (issued February 23, 2018).

<sup>21</sup> *See J.D.*, Docket No. 18-1765 (issued June 11, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 21, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board